



Attorney General of New Mexico

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April 21, 2010

Kelly O'Donnell, Ph.D.
Superintendent
Regulation and Licensing Department
2550 Cerrillos Road
Santa Fe, New Mexico 87505

Re: Opinion Request Regarding Amendment to NMSA 1978, Section 3-17-6(A).

Dear Superintendent O'Donnell:

You have requested our opinion regarding a 2007 law amending Section 3-17-6 of the Municipal Code. See 2007 N.M. Laws, ch. 132, § 1, codified at NMSA 1978, § 3-17-6. The amendment went into effect on July 1, 2009. As amended, the provision authorizes a municipality to adopt by ordinance "a building code that includes provisions for plan review, permitting and inspections for general, electrical, mechanical and plumbing construction." NMSA 1978, § 3-17-6(A)(3) (2007).

You asked three questions, namely:

- 1) Does this law apply to municipalities that had building ordinances in effect before July 1, 2009 and if so, how?
- 2) Does this law authorize the Construction Industries Division ("CID") of the Regulation and Licensing Department to predicate the issuance of municipal inspector certificates on a requirement that the municipality has adopted an ordinance that covers all building trades as required by the new law?
- 3) To what extent does CID have the authority to enforce this statute and through what means?

As discussed more thoroughly below, the answers to your three questions are as follows:

- 1) The law does not affect municipalities that had building ordinances in effect before July 1, 2009.
- 2) The law does not authorize CID to predicate the issuance of municipal inspector certificates on whether the municipality has adopted an ordinance that covers all the construction trades listed in Section 3-17-6(A)(3), as amended.
- 3) CID has no authority to enforce Section 3-17-6(A)(3) by requiring a municipality that elects to adopt a building code to include all the construction trades listed in that provision.

1. Applicability of the 2007 Amendment

Before the 2007 amendment, Section 3-17-6 provided, in pertinent part:

- A municipality may adopt by ordinance the conditions, provisions, limitations and terms of an [sic]: ...
- (3) building code; ...
 - (5) electrical code; ...
 - (9) plumbing code; ... or
 - (11) any other code not in conflict with the laws of New Mexico or valid regulations issued by any board or agency of New Mexico authorized to issue regulations.

Any code so adopted shall provide for minimum requirements at least equal to the state requirements on the same subject.¹

¹ As discussed below in the text, the Construction Industries Licensing Act ("CILA") creates several trade bureaus within the CID, including an electrical bureau, a mechanical bureau and a general construction bureau. NMSA 1978, § 60-13-31 (1983). The bureaus recommend to the Construction Industries Commission ("Commission") minimum standards for the activities within their respective jurisdictions. *Id.* § 60-13-44 (2007). CID and the Commission, by rule, adopt standards and codes based on the bureaus' recommendations. *Id.* §§ 60-13-9(F) (1989); 60-13-44(J). Currently, the Commission has adopted building codes, plumbing codes, mechanical codes, electrical codes and codes and standards applicable to manufactured housing. *See* 14.7 to 14.10 NMAC.

The 2007 amendment deleted the specific references to an electrical code and a plumbing code in subsections (A)(5) and (9), and changed subsection (A)(3) to read: “a building code that includes provisions for plan review, permitting and inspections for general, electrical, mechanical and plumbing construction.”

In interpreting a statute, courts look to its plain language to determine legislative intent. When the “statute’s language is clear and unambiguous, we give the statute its plain and ordinary meaning and refrain from further interpretation.” City of Farmington v. The Daily Times and New Mexico Found. for Open Gov’t, 2009-NMCA-057, ¶ 6, 210 P.3d 246 (quoting Bd. of Comm’rs of Doña Ana County v. Las Cruces Sun-News, 2003-NMCA-102, ¶ 19, 134 N.M. 283.) In addition to the text of a statute, courts “consider the statutory subsection in reference to the statute as a whole and read the several sections together so that all parts are given effect.” Bishop v. Evangelical Good Samaritan Soc., 2009-NMSC-36, ¶ 11, 212 P.3d 361.

The 2007 amendment to Section 3-17-6(A)(3) authorizes a municipality to adopt a building code that includes provisions for general, electrical, mechanical and plumbing construction. The statute’s language is permissive, as “may” is usually used to express opportunity or permission. See NMSA 1978, Section 12-2A-4(B) (1997). The permissive tone continues in subsection (A)(9) of the current version of Section 3-17-6 (formerly Section 3-17-6(A)(11), quoted above), which permits a municipality to adopt a code not listed in Section 3-17-6(A), as long as it comports with state law, validly-issued regulations and minimum state requirements. See also NMSA 1978, § 60-13-4(F) (providing that codes adopted under CILA shall “constitute a minimum requirement for codes of political subdivisions). In this context, the 2007 amendment, on its face, merely authorizes a municipality to adopt a building code that includes provisions for the listed types of construction. The amendment does not require municipalities to adopt a building code or prohibit municipalities from adopting building codes that include provisions for some, but not all, of the listed types of construction.

We understand that supporters of the original bill enacting the 2007 amendment intended the amendment to require municipalities that adopted a building code to include all of the provisions listed in subsection (A)(3). This was more apparent in the original bill, which included a provision expressly requiring a municipality, “in the case of a building code,” to “adopt as a minimum standard the national code adopted, amended and enforced by the construction industries division of the regulation and licensing department.” See H.B. 219, 48th Leg., 1st Sess. (N.M. 2007) (introduced by Rep. John A. Heaton). That language was not included in the House floor substitute for the bill, which, in substantive part, became the final law. This omission supports our conclusion that the 2007 amendment, as ultimately enacted, does not require municipalities to include all the provisions listed in the amendment in their building codes.

On balance, it appears that the 2007 amendment to Section 3-17-6 rearranges subsection (A) by including electrical and plumbing codes under the category of building code, but does not otherwise change the law. Consequently, we conclude that the 2007 amendment does not affect municipalities with building ordinances in effect before the effective date of the amendment.

2. Conditions for Issuing a Municipal Inspector Certificate

Section 60-13-41(B) of CILA provides that the Commission shall prescribe qualifications and job descriptions for state and municipal inspectors. CILA also authorizes CID, with Commission approval, to “establish qualifications for inspectors certified to inspect in more than one bureau’s jurisdiction.” NMSA 1978, § 60-13-41(E) (2001). NMSA 1978, § 60-13-31 (1983). The bureaus, which are organized by trade, are responsible for certifying inspectors approved by CID in their respective jurisdictions. Id. § 60-13-43.

An administrative agency has no power to create a rule or regulation that is not in harmony with its statutory authority. See New Mexico Bd. of Pharm. v. New Mexico Bd. of Osteopathic Med. Examin’rs, 95 N.M. 780, 782, 626 P.2d 854, 856 (Ct. App., 1981.) Agencies must also act reasonably. See, e.g., New Mexico Indus. Energy Consumers v. New Mexico Pub. Regulation Comm’n, 2007-NMSC-53, ¶ 19, 142 N.M. 533, 168 P.3d 105 (an “agency’s interpretation of a law” will be reversed “if it is unreasonable or unlawful”).

As discussed above, we do not believe that Section 3-17-6, as amended, requires a municipality to adopt a building code that includes all the trades listed in Subsection (A)(3). Even if it did, nothing in CILA allows CID to predicate the issuance of municipal inspector certificates on a requirement that the municipality has adopted a particular code. Under CILA, the issuance of a municipal inspector’s certificate depends on an applicant’s qualifications to inspect in the jurisdiction of a trade bureau. Although CILA contemplates in Section 60-13-41(E) that an inspector might be qualified to inspect in more than one trade bureau’s jurisdiction, this is not a requirement for a municipal inspector certificate. In short, we are unable to discern any authority for CID to refuse to certify an otherwise qualified inspector based on whether the municipality has complied with the statutory code requirements. The actions of the municipality have no apparent relation to or bearing on the inspector’s qualification for certification.

3. CID Enforcement of the 2007 Amendment.

As discussed above, municipalities have considerable discretion regarding the codes they choose to adopt. The only requirement is that they reflect, at a minimum, the codes adopted under CILA. See NMSA 1978, §§ 3-17-6(A), 60-13-4(F). If a municipal code did not meet minimum state requirements in violation of CILA, CID is statutorily authorized to apply for mandamus, injunction “or any proper legal proceeding” in the appropriate district court. Id. § 60-13-53 (1989). In answer to your specific question, because we have concluded that Section 3-17-6(A)(3), as amended, cannot be reasonably interpreted to require a municipality to adopt a building code that includes all the building trades listed in the provision, we believe that CID is not authorized to bring an action to enforce that interpretation.

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If we may be of further assistance, please let us know. Your request was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Sincerely,

A handwritten signature in cursive script, appearing to read 'M. Valicenti', written in dark ink.

MONA VALICENTI

Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General
Randall Van Vleck, Municipal League General Counsel